SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 209

MAGNOLIA PETROLEUM COMPANY,
Petitioner,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

I. Opinion Below.

The petition seeks a writ directed to the Court of Claims of the United States, to review a judgment rendered by it in the suit there entitled "Magnolia Petroleum Company v. The United States of America", reported in 53 F. Supp. 231 (R. 28-35).

II. Jurisdiction.

The grounds upon which the jurisdiction of this court is invoked have been set forth in the petition. Briefly stated, jurisdiction is based upon c. 229, sec. 3, 43 Stat. 939, February 13, 1925, as amended May 22, 1939; c. 140, 53 Stat. 752 (Tit. 28, Sec. 288). Also there is a conflict between the

decision of the court below and the case of *Jones* v. *Continental Oil Company*, 141 F. (2d) 923, decided by the United States Circuit Court of Appeals, Tenth Circuit, on March 21, 1944.

III. Statement of Case.

The facts have been stated in the petition. Additional facts will be set out in the detailed discussion of each error of fact and of law as they are hereinafter discussed.

In its Motion for New Trial and for Amendment of Findings (R. 36) petitioner set out separately errors of fact and of law. The court overruled said motion (R. 36). These errors are hereinafter discussed.

IV. Argument.

In summary, the petitioner's position is that the holding of the court below that (a) the loading of refined products at the Beaumont refinery and (b) the loading of crude petroleum on barges at the Cameron Meadows lease constituted "transportation * * * by pipe line" within the taxing statute is without support, first, because the court failed to consider the undisputed facts of the record and made findings which cannot be supported by the record, and, second, because the court misinterpreted and misapplied the provisions of Art. 26 of Treas. Reg. 42. Also, the petitioner contends that the court erred in failing to hold that, even if the movements were otherwise taxable, the Commissioner, under Sec. 731(b) of the Revenue Act of 1932, was authorized in this case to determine what would be a reasonable charge upon which to assess the tax.

(1) Errors of Fact.

The errors of fact relied upon are set forth immediately hereinafter as Nos. 1 to 10, inc. and are discussed in detail. In its Motion for New Trial and for Amendment of

Findings (R. 36), petitioner specifically requested the court to correct said errors and amend its findings.

ERROR OF FACT NO. 1.

In its Special Finding 12, the court below found the following as a fact:

> "Other pipe line companies operating in the Beaumont and Magpetco area made a charge for loading of from 1½ to 2½ cents per barrel." (R. 32)

The foregoing would be a correct statement only in the event the following fact were included, and this the court erroneously omitted to do.

> "However, all such charges for loading were made only when the loading service was rendered as a *continuation or part of a prior taxable service.*"

The evidence in the record on which the correct findings are to be based, consists of nine tariffs (See Stipulation of Parties, Exhibits A to I, inc., R. 120) of pipe line companies filed with the Interstate Commerce Commission, as follows:

Atlantic Pipe Line Company, I. C. C. No. 13, issued May 31, 1934, effective July 1, 1934. This is a local pipe line tariff applying on crude petroleum from points in Texas and New Mexico to Atreco, Harbor Island, and Oak Point, Texas. The basic rates shown on the tariff (R. 120B) are for a taxable service; no rates whatever are quoted for loading except when made in connection with a prior taxable service; in the named circumstances and only then, as shown by General Rule No. 1 (R. 121) of the tariff, "an additional charge of 1½ cents per barrel will be made."

Gulf Pipe Line Company, I. C. C. No. 10, issued August 17, 1934, effective September 17, 1934, and Gulf Refining

Company Supplement No. 1 thereto. This is a joint pipe line tariff quoting a rate of 32½ cents per barrel for the transportation of crude petroleum from stations in Kansas and Oklahoma to Port Arthur, Texas. The tariff states (R. 124A) that "all deliveries to vessels will be subject to an additional charge of 2½ cents per barrel,"—a clear instance of loading which occurs only as a continuation of a prior taxable movement.

Gulf Refining Company of Louisiana, I. C. C. No. 3, issued November 14, 1934, effective December 14, 1934, and Gulf Refining Company Supplement No. 1 thereto. This is a joint tariff (R. 126B) quoting rates from stations in Louisiana and Arkansas to Port Arthur, Texas. The rates quoted are "for the transportation of crude petroleum by pipe lines" and it is only in connection with such transportation that "all deliveries to customers' vessels or to tank cars will be subject to a further charge of 2½ cents per barrel."

Humble Pipe Line Company, I. C. C. No. 22, issued November 21, 1928, effective December 27, 1928. This tariff (R. 128B) relates to local terminal charges "applying on interstate and intrastate traffic" (clearly this is taxable transportation) at Harbor Island, Texas. The tariff states that in connection with such transportation the carrier will assess a terminal charge of 2½ cents per barrel on petroleum and its products handled through the terminal facilities of the carrier and loaded aboard vessels at Harbor Island.

Humble Pipe Line Company, I. C. C. No. 180, issued September 14, 1936, effective October 18, 1936. This tariff (R. 128C) quotes rates for "the transportation of crude petroleum by pipe lines" from points in Texas to Anchorage, Louisiana. The tariff states that "all oil required to be loaded aboard ship at North Baton Rouge, Louisiana

will be subject to an additional charge of two and one-half cents (2½¢) per barrel."

Magnolia Pipe Line Company, I. C. C. No. A-26, issued September 20, 1932, effective October 20, 1932; I. C. C. No. A-54, issued February 10, 1936, effective March 12, 1936; I. C. C. No. A-56, issued March 18, 1936, effective April 18, 1936; and I. C. C. No. A-40, issued December 1, 1934, effective January 1, 1935. These are tariffs (R. 134A-150A) relating to the "transportation" of crude petroleum from points in Oklahoma, Arkansas, Louisiana, and Texas to points in Texas and Arkansas, and from King's Mill, Texas to Beaumont and Magpetco, Texas. Each of the tariffs states that the carrier has no facilities for loading oil into consignees' vessels at Beaumont and Magpetco; that the quoted rates do not include that service; and that owners of oil will be required to make their own arrangements for such loading.

In addition, the testimony of qualified witnesses, in the record, shows that no pipe line carrier ever performed the function of loading within the confines of a refinery, such as the operation of the petitioner at Beaumont (R. 63, 86).

Error of Fact No. 2.

In its Special Finding 12, the court below erroneously found the following as a fact:

> "Pipe line companies operating in the neighborhood of plaintiff's Cameron Meadows lease made a charge for loading of 2½ cents per barrel" (R. 32).

There is no evidence whatever in the record which will support the foregoing finding; it appears to be founded on the following statement, unsupported by the record, which appeared in the defendant's brief:

> "It is conceded that the question before this Court in respect of the Cameron Meadows operations is a

> close one. It is a fact, however, that similar services are provided in the oil-producing swampy lands of Louisiana by public carrier pipe-line companies and a rate of 2½¢ per barrel is listed as the tariff therefor."

There are listed and described immediately below the only tariffs in the record quoting rates to or from Louisiana points. The loading charges quoted are not for services "similar" to the producing operations of the petitioner at Cameron Meadows; they are for loading in connection with through movements of oil. Moreover, the only loading charge quoted for loading at a point in Louisiana relates to loading at North Baton Rouge, which is not "in the neighborhood of plaintiff's Cameron Meadows Lease," being many miles distant therefrom.

The tariffs referred to are:

Gulf Refining Company of Louisiana, I. C. C. No. 3, which quotes rates for "the transportation of crude petroleum by pipe lines" from "points established by the Gulf Refining Company of Louisiana for the reception of crude petroleum into its trunk lines" to Port Arthur, Texas (R. 126B).

Humble Pipe Line Company, I. C. C. No. 180, which names rates for "the transportation of crude petroleum by pipe lines" from named points in Texas to Anchorage, Louisiana (R. 128C).

Magnolia Pipe Line Company, I. C. C. Nos. A-26 and A-54 which quote rates for "the interstate transportation by carrier's trunk pipe lines of crude petroleum" from points in Louisiana to Beaumont and Magpetco, Texas (R. 134A, 138A).

Humble Pipe Line Company's I. C. C. No. 180, mentioned above, is the only tariff which quotes a rate for loading into vessels at a point (North Baton Rouge) in Louisiana. The loading charge of 2½ cents per barrel there

quoted is for the performance of such a service only as a continuation or part of a prior taxable service. In addition, North Baton Rouge is many miles distant from Cameron Parish, Louisiana, where petitioner's lease is located (R. 24).

Error of Fact No. 3.

In its Special Finding 12, the court below erroneously found the following as a fact:

> "This service [loading oil into vessels] was rendered by plaintiff, when required of it, for which it made a charge of 1½ cents per barrel" (R. 31).

The inference to be drawn from the foregoing is that Magnolia Petroleum Company performed loading services for others at the terminals of Magnolia Pipe Line Company at Beaumont and at Magpetco. There is nothing in the record which supports any such finding. The facts are that at no time did Magnolia Petroleum Company ever load any refined products or any crude oil for others at Beaumont (R. 117). At Magpetco, petitioner at times did render terminal service in connection with through movements of oil. However, no stoppage was involved (R. 113-114), and only a small amount of oil was handled for others in this manner (R. 117). Such loadings, being in connection with through movements, were tax paid since they were not local or incidental to the refining of oil, as was the case at Beaumont. Cf. Reg. 42, Art. 26.

Error of Fact No. 4.

Although petitioner filed a request therefor (R. 35), the court below erroneously omitted to adopt the findings of its Commissioner (Mr. Ramseyer) to the following effect:

> "22. The plaintiff in its petition takes the position that in the event the court should hold that the opera-

tions of transferring oil from tanks to vessels and barges were taxable as constituting 'transportation of crude petroleum and liquid products thereof by pipe line,' then the charges which the Commissioner of Internal Revenue applied in levying the taxes were not fair.

"23. On moving refined products and crude oil from tanks to vessels at the Beaumont refinery the Commissioner applied a charge of 1½ cents per barrel. On moving refined products from the Beaumont refinery by the 8-inch pipe line to the Magpetco terminal and loading into vessels at that point he applied 2½ cents per barrel. On moving crude oil at the Magpetco terminal from tanks into vessels he applied 1½ cents per barrel. On moving crude oil from tanks into barges at Cameron Meadows lease he applied 2½ cents per barrel.

"24. During the periods involved the plaintiff had a gross investment of approximately $556,440.93 in the wharf loading facilities at its Beaumont refinery. During the same period at the Magpetco terminal plaintiff had a gross investment of approximately $357,314.43 in its wharf loading facilities and pipe line from Beaumont.

"25. Based on its 1935 operations, rates of $.005, $.006, and $.007 per barrel at Beaumont would have yielded net returns of 10%, 15%, and 20%, on the investment, as shown by plaintiff's exhibit 9. Based on the same year's operations, rates of $.016, $.019, and $.021, per barrel at Magpetco would have yielded net returns of 10%, 15%, and 20%, on the investment, as shown by plaintiff's exhibit 10. A charge that would yield 10% return on the investment would be fair. Yields at Beaumont and at Magpetco for all other years involved would have been substantially the same.

"26. At the Cameron Meadows lease the investment in all loading facilities was not in excess of $2,500. For the entire period of 3¾ years, 1,809,000 barrels of

crude oil were loaded into barges at Cameron Meadows. Applying the Commissioner's rate of 2½ cents per barrel gives an annual return of $12,053.00 on an investment of $2,500, or an annual return on the investment of 482%."

The foregoing findings relate to the petitioner's alternative position to the effect that the rates as fixed by the Commissioner of Internal Revenue and used by him as a basis for the tax assessed were not reasonable rates and were not fair charges for the services. It was expressly stated to the court below that the inclusion of such findings was necessary in connection with the presentation by petitioner of its alternative position to this Court on certiorari.

Error of Fact No. 5.

In its Special Finding 4 (R. 29), the court below erroneously omitted to find that in his letter dated May 6, 1940, the Commissioner ruled that the loading of refined products at the Beaumont refinery was not taxable and that petitioner was entitled to a refund of tax in the amount of $78,883.50 (R. 22-23, 43). The said finding was considered necessary by petitioner as showing that its position herein is in strict accordance with the terms of Art. 26 of Reg. 42 which, as regards the taxable periods here involved, has never been amended and is still in force and effect.

Error of Fact No. 6.

In its Special Finding 6 (R. 30), the court below erroneously omitted to adopt as its finding the following fact as set forth in the findings of its Commissioner, Mr. Ramseyer:

> "Its [the Beaumont refinery of petitioner] capacity was 105,000 barrels of crude oil per 24 hours, that is, running at capacity it would consume during 24 hours 105,000 barrels of crude oil in the refining operations."

The foregoing supports the petitioner's position that the distance from the wharf, of some of the storage tanks from which loading occurred at the Beaumont refinery was not great in view of the size of the refinery, and that such loading was local and also incidental to the business of refining as contemplated by Art. 26 of Reg. 42.

ERROR OF FACT NO. 7.

In its Special Finding 7 (R. 30), the court below erroneously omitted to adopt as its finding the following fact as set forth in the findings of Commissioner Ramseyer:

> At the group of tanks mentioned "there might be still another operation, such as blending, before the product was pumped aboard the vessel."

The foregoing fact supports the petitioner's position that the loading operations in question were incidental to the business of refining as contemplated by Art. 26 of Reg. 42.

ERROR OF FACT NO. 8.

In its Special Finding 9 (R. 30), the court below erroneously omitted to adopt as its finding the following facts as set forth in the findings of Commissioner Ramseyer:

> "The tanks from which oil was taken to be loaded on the vessels were also used for other operations, that is, the same tanks were used for refining operations and loading operations. The majority of the tanks had a capacity of 55,000 barrels each."

The foregoing facts support the petitioner's position that the loading operations in question were incidental to the business of refining as contemplated by Art. 26 of Reg. 42.

ERROR OF FACT NO. 9.

The court below erroneously omitted to include in its findings the following facts as set forth in the findings of Commissioner Ramseyer:

> "The discharge lines were from 12 to 20 inches in diameter, and loaded oil into vessels at a rate of from 7,500 to 20,000 barrels per hour. During the period involved the capacities of pipe line carriers were from 20,000 to 40,000 barrels per 24-hour day. The pipeline pumps and the pumps used at Beaumont were different in types, sizes, and pressures."

The foregoing facts support the petitioner's position that the facilities which it used in loading operations did not constitute a "pipe line" as that term is understood in the industry and as used in the taxing act.

ERROR OF FACT NO. 10.

The court below erroneously omitted to include in its finding the following facts as set forth in the findings of Commissioner Ramseyer:

> "There was no pipe line carrier which performed the function of loading oil on ships within the plaintiff's premises. All the employees, the pumping equipment, and other equipment, used in loading were also used in refining processes on the refinery grounds. In the refinery grounds there was a tangled network of underground lines of pipes running in every direction connecting tanks with each other, tanks with stills, tanks and stills with pump house, pump house with loading racks, etc. The discharge lines running from the pump house to the loading racks on the wharf were used exclusively for loading purposes."

Not only do the foregoing facts show that the operations involved were not "substantially similar to movements

which pipeline carriers usually undertake and perform" (Reg. 42, Art. 26), but they also show that the operations were "merely local or incidental to * * * the refining of oil."

(2) Errors of Law.

The following is a specification of the errors of law relied upon.

1. The court below erroneously found, as a matter of law, that the petitioner was not entitled to recover the taxes paid on loadings of refined products at Beaumont and erroneously held that the same constituted taxable transportation of oil by pipe line. In so doing it misinterpreted and misapplied the provisions of Art. 26 of Treas. Reg. 42.

2. The court below erroneously found, as a matter of law, that the petitioner was not entitled to recover the taxes paid on loadings of oil at Cameron Meadows and erroneously held that the same constituted taxable transportation of oil by pipe line. In so doing it misinterpreted and misapplied the provisions of Art. 26 of Treas. Reg. 42.

3. The court below erroneously found, as a matter of law, that the Commissioner, under Sec. 731(b) of the Revenue Act of 1932, was not authorized in this case to determine what would be a reasonable charge upon which to assess the tax.

4. The court below erroneously decided, as a matter of law, that the petitioner was not entitled to recover.

ARGUMENT ON ERRORS OF LAW NOS. 1, 2, AND 4, BEAUMONT AND CAMERON MEADOWS.

These errors relate to the holding that the petitioner was not, as a matter of law, entitled to recover the taxes imposed upon it in respect of the loading of refined products at the Beaumont refinery and the loading of crude oil on its producing lease at Cameron Meadows.

As regards the Beaumont and the Cameron Meadows items, the Court erred primarily in not correctly interpreting and applying the provisions of Art. 26 of Treas. Reg. 42. As to the taxable periods here involved, the cited regulation has never been amended and is still in effect.

The first portion of Art. 26 which is immediately relevant reads as follows:

> "It [transportation * * * by pipe line] also includes the transportation by private owner whenever the movement is substantially similar to movements which pipe-line carriers usually undertake and perform, *if the movement is not merely local or incidental to another business or a related business engaged in by the person so transporting, such as the producing or refining of oil*" (emphasis supplied).

The opinion of the court interprets the language above quoted from the regulations, as follows:

> "Although this regulation seeks to exempt from the tax a transportation which is incidental to a business engaged in by the owner of the oil, it is seen that the basic test established by it is whether or not the transportation service upon which the tax is levied is customarily performed by a pipe-line carrier" (R. 34-35).

To the contrary, as will be seen from an examination of the language of the regulation, there are two tests prescribed therein. First, if the movement is to be taxed, it must be "substantially similar to movements which pipeline carriers usually undertake and perform." Second, not all such movements are taxable, but only those which are "not merely local or incidental to another business * * * such as the producing or refining of oil." The test is not simply whether the movement is "substantially similar" but whether, even if substantially similar, it is a movement that is not merely "local or incidental" to the production or refining of oil.

It is to be noted that as regards the loading of refined products at Beaumont, the Commissioner ruled in his letter of May 6, 1940 (R. 22) that the movement was not only (1) local and incidental but also (2) that it was not substantially similar to a pipe line movement. In that letter the Commissioner stated:

> "Since the tanks are contiguous to and in the immediate vicinity of the wharf ["local or incidental"] and since no substantial pipe line movement is involved, it is held that the tax is not applicable * * *" (R. 22).

As to the loading charges, the court ignored the fact, brought to its attention by petitioner, that Art. 26 contains the following express provision.

> "Delivery service such as loading into tank cars or tank vessels by means of loading racks is subject to tax *when rendered as a continuation or part of a prior taxable service*" (emphasis supplied).

In spite of the clear applicability of the above provision to the issues of this case, this court ignored it. Substantial portions of the regulation are set out in the opinion (R. 34), but the Court did not quote the provision applicable to loading nor discuss it.

The Commissioner of Internal Revenue carefully investigated the fact situation here involved and had representatives on the ground. He followed his own regulations and, as stated, did not assess the tax originally on the loading of refined products at Beaumont (Letter of May 6, 1940, R. 22).

There can be no question in this case but that the loading at Beaumont of refined products was not rendered as a continuation or part of a prior taxable service. The crude petroleum that was delivered to Beaumont and there proc-

essed had come to the end of its journey. The refined products of crude were loaded, not crude.

The Commissioner, in issuing the regulation, was simply taking cognizance of the facts. He must have known, as the record conclusively shows, that pipe line carriers perform the service of loading only at the end of their trunk line systems, for their own customers and only with reference to oil brought to their own terminals (R. 86).

Men long in the service of the oil industry testified that they knew of no case where a pipe line carrier performed a loading function within the confines of a refinery (R. 62-63, 75, 86). These facts make it clearly impossible for petitioner to have acquired any advantage by virtue of owning its own loading facilities over other refineries not so situated. The facts seem to indicate that all refineries are similarly situated with reference to such facilities. The government presented no evidence whatever that would indicate any such advantage, and in all of the tariffs (R. 120-150A) introduced by the government, charges for loading were made for services to be performed at the end of the carriers' respective trunk line systems and at their respective terminals.

This point was not considered in *McKeever* v. *Fontenot*, 104 F. (2d) 326 (C. C. A., 5th, 1939), cert. den., 308 U. S. 588 (1939), and that case ought not to be controlling here. This case should be decided on its own facts. A decision in another case should be ignored when it fails to take into consideration the very provisions of the regulations which are applicable to the question at issue. Regulations laid down for the guidance of taxpayers should not be ignored in the determination of their taxes.

We therefore respectfully urge that the court below was in error in holding that the loading of refined products at Beaumont constituted taxable transportation of oil by pipe line.

CAMERON MEADOWS, ADDITIONAL CONSIDERATIONS.

The court below held that "the transportation at the Cameron Meadows lease was also from storage tanks to vessels." (R. 35).

The Commissioner's letter of May 6, 1940 (R. 22-24), sets out that the rate covers *gathering* as well as *loading* and the tax was so assessed.

Oil as it came from the wells was placed in settling tanks where it was treated. From the settling tanks it was moved by lines of pipe to stock tanks. From the stock tanks, it was transferred to barges, through pipe and rubber hose, at a distance of 150 to 400 feet (R. 51-52).

We submit that no distinction exists between the facts in this case and those in the case of *Big Lake Oil Company* v. *Driscoll,* 40 F. Supp. 510 (Dist. Ct., W. D. Pa., 1941) cited by us to the court below. In the Big Lake case, the movements were from the wells to a treating plant (similar to settling tanks in this case) and from the treating plant to storage tanks. The court in that case states on page 511:

> "Until July, 1934, the treated oil was stored in tanks constructed by plaintiff some distance from the treating plant but upon its own property. After that date it was stored in tanks in the immediate vicinity of the treating plant. Delivery to the purchasing company was made from the storage tanks."

The court further stated with reference to transfer from the treating plant to the storage tanks:

> "This was a mere storage comparable to the transfer of oil from the mouth of the well to the flow tanks. *Pipe line service began upon delivery to the purchasing company for transportation to market"* (Emphasis supplied).

Judgment was entered in favor of the plaintiff, the court thus holding that neither the transfer from an oil well to the

treating plant nor the transfer from the treating plant to storage tanks was taxable.

In the case of *Jones* v. *Continental Oil Co., supra*, the court approved the finding of the trial court that the movement of oil from the wells to the treating plant and from the treating equipment into storage tanks when considered as one continuous movement was in reality a part of the production process and not taxable.

It, therefore, follows that the court below was in error in assessing any tax here for "gathering."

Nor should any tax have been assessed for "loading." This has been discussed in detail under the preceding point. The loading at Cameron Meadows consisted of the running of oil by gravity through 150 to 400 feet of pipe and rubber hose to barges all on one producing lease. From the record it is apparent that no pipe line carrier does or would perform a service similar to that performed on the Cameron Meadows lease (R. 87). The record shows that the movement is not substantially similar to movements which pipe line carriers usually undertake and perform. Following as it does the non-taxable movement from treating tanks to storage tanks, it is not a continuation or part of a prior taxable movement.

It follows from what has been said that no charge should be made at all in the case of the Cameron Meadows loadings; that as the charge of 2½ cents was made both for gathering and loading, the charge cannot stand on the basis of either gathering or loading.

The court below has upheld a charge of 2½ cents per barrel for loading only, but this cannot stand as it was not so assessed.

We respectfully urge that the court was in error in denying petitioner recovery for the taxes assessed against it on the Cameron Meadows operations.

Argument on Errors of Law Nos. 3 and 4.

"Fair Charge."

Petitioner contends that the charges upon which the taxes were assessed were not fair charges and that under the law these charges could not exceed those which would produce a fair return on investment.

The court below held that the argument is of no avail—

> "because the tax was assessed on the charge established by bona fide tariffs. It is only in the absence of tariffs that the Commissioner is authorized to determine what would be a reasonable charge (Sec. 731 (b)). See *National Pipe Line Co.* v. *United States,* 99 C. Cls. 180, 190, et seq." (R. 35).

The "fair charge" mentioned in Sec. 731(a) (2) of the Act is computed in the following manner:

> "(b) For the purposes of this section, the fair charge for transportation shall be computed—
>
> "(1) from actual bona fide rates or tariffs, or
>
> "(2) if no such rates or tariffs exist, then, on the basis of the actual bona fide rates or tariffs of other pipe lines for like services, as determined by the Commissioner, or
>
> "(3) if no such rates or tariffs exist, then on the basis of a reasonable charge for such transportation, as determined by the Commissioner." Section 731 (b). See also Reg. 42, Art. 28.

Since the petitioner does not operate a pipe line it did not, of course, publish tariffs applicable to the movements in question. Therefore, no "actual bona rates or tariffs" were in existence.

Likewise, the tariffs of pipe line carriers such as those introduced in this case are not applicable, for the reason that the evidence in this case conclusively shows that these tariffs are not for like services. The court erred in failing to find that the loadings involved in this case were not like the services covered by the tariffs introduced in the case. Petitioner introduced evidence showing the dissimilarity, and the government introduced no proof on this point whatever (R. 111-112).

The law, in providing that like tariffs can only be applied to *like services,* recognizes the fact that all loading services are not alike and that a charge is not fair unless the services rendered are similar.

At Cameron Meadows the oil is loaded by gravity into small barges from storage tanks 150 to 400 feet away (R. 52). Compare this to the loading by the large pipe line companies at their terminals where there are large tank farms with necessary loading from greater distances, and the additional service rendered by pipe line companies at their terminals, including the receiving, holding and loading, and all expenses connected therewith, including loss from evaporation (R. 112).

As pointed out in our Motion for a New Trial filed with with the court below (R. 36), counsel for the government in his brief made the following statement with reference to Cameron Meadows:

> "It is a fact, however, that similar services are provided in the oil-producing swampy lands of Louisiana by public carrier pipe line companies and a rate of 2½ cents per barrel is listed as the tariff therefor."

There is no evidence at all in the record to substantiate such a statement. All of the evidence introduced in this

case by the government consisted solely of some tariffs (R. 120-152). No evidence was introduced indicating that the terminals of these carriers were in oil-producing swampy lands of Louisiana.

Further, there was no evidence introduced showing that the services rendered by any pipe line carrier were like services to those performed by Magnolia for itself at Beaumont. All of the evidence is to the contrary.

In the absence of rates or tariffs that are in existence covering like services, the charges are to be fixed on the basis of a reasonable charge in accordance with Sec. 731(b)(3) and the regulations cited hereinbefore.

The regulations provide for the submission of data covering investment, etc. Petitioner fully complied by furnishing such data to the Commissioner. Likewise, petitioner fully developed in this record the amount of investment, expense, rate of return on investment and similar data affecting the loadings at the Beaumont refinery and at Cameron Meadows (R. 93, *et seq.*)

Commissioner Ramseyer heard this evidence and filed his findings thereon.

His conclusion was:

> "A charge that would yield 10% return on the investment would be fair."

We respectfully submit that the court below was in error in refusing to consider the evidence in the case and in holding that, as a matter of law, the Commissioner of Internal Revenue was not authorized to determine what would be a reasonable charge upon which to assess the tax.

V. Conclusion.

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

RAYMOND M. MYERS,
Magnolia Building,
Dallas 1, Texas;
HOMER HENDRICKS,
920 Southern Building,
Washington 5, D. C.,
Attorneys for Magnolia Petroleum Company, Petitioner.